

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTONIO LOPEZ,	§
	§ No. 27, 2010
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0607000462
	§
Plaintiff Below-	§
Appellee.	§

Submitted: May 28, 2010

Decided: August 2, 2010

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices

ORDER

This 2nd day of August 2010, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The defendant-appellant, Antonio Lopez, filed an appeal from the Superior Court's January 4, 2010 order denying his motion for Level V credit against his sentence. On the basis of the record and the State's answering brief, we conclude that the Superior Court's judgment must be reversed. Accordingly, this matter will be remanded to the Superior Court for further action in accordance herewith.

(2) The record reflects that, in August 2006, Lopez pleaded guilty to Trafficking in Cocaine. He was sentenced, effective July 2, 2006, to 2

years and 6 months at Level V, to be suspended after 2 years for 18 months at Level III. Lopez' sentence was suspended for Boot Camp diversion.¹ Lopez completed the Level V portion of his Boot Camp sentence, but subsequently was charged with a violation of probation ("VOP") in connection with the Aftercare portion of the sentence. In December 2007, the Superior Court found that Lopez had not committed a VOP and continued his probationary sentence. Thereafter, Lopez filed a motion for sentence modification, which the Superior Court denied.

(3) In February 2008, Lopez again was charged with a VOP. This time, the Superior Court found that he had committed the VOP. The Superior Court again continued his previously-imposed sentence, but ordered that Lopez would be held at Level V until space became available at Level IV Work Release. Lopez again moved for sentence modification, which the Superior Court denied. In November 2008, Lopez once again was found to have committed a VOP. His deferred sentence of 2 years and 6 months at Level V was re-imposed. Lopez subsequently filed two motions for sentence modification, both of which were denied by the Superior Court.

(4) In February 2009, Lopez filed 2 motions for sentence modification. The first motion, which he filed *pro se*, was denied by the

¹ Del. Code Ann. tit. 11, §§6705 and 6712.

Superior Court. With respect to the second motion, which was filed by counsel, the Superior Court modified its November 2008 order to reflect that Lopez was serving a 2-year minimum mandatory sentence. In August 2009, Lopez filed another motion for sentence modification. The Superior Court granted the motion and modified its prior sentence to reflect that Lopez was entitled to Level V credit for 2 months previously served. In December 2009, Lopez filed a motion seeking credit additional credit for 92 days of Level V time. On January 4, 2010, the Superior Court amended its prior order crediting Lopez with only an additional 5 days.

(5) In this appeal from the Superior Court's January 4, 2010 order, Lopez claims that the Superior Court abused its discretion by failing to credit him with the additional Level V time to which he is entitled.

(6) This Court has held that a defendant must be given credit for all time previously served at Level V when further incarceration is imposed following the finding of a VOP.² Moreover, even though a defendant is not entitled to credit for time spent at Boot Camp, he is entitled to Level V time spent waiting to enter the Boot Camp program.³

(7) In its answering brief, the State concedes, following an exhaustive review of Lopez' history of incarceration, that Lopez is entitled

² *Gamble v. State*, 728 A.2d 1171, 1172 (Del. 1999); Del. Code Ann. tit. 11, §3901(c).

³ *Whitner v. State*, 762 A.2d 18, 19 (Del. 2000); Del. Code Ann. tit. 11, §6712(h).

to be credited with 92 days against his current Level V sentence, representing Level V time waiting to enter Boot Camp and time when he was held at Level V in default of bond in 2007 and 2008.⁴ As such, we conclude that the judgment of the Superior Court must be reversed and this matter remanded to the Superior Court for entry of an order giving Lopez credit for the additional amount of Level V time to which he is entitled.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and this matter is REMANDED to the Superior Court for further action in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

⁴ The Superior Court has already given Lopez credit for an additional 2 months and 5 days of Level V time.